Supreme Court, U.S.
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No.
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In the

Supreme Court of the United States

October Term, 1996

ALGERNON BLAIR, AND
UNITED STATES FIDELITY AND
GUARANTY COMPANY, *Petitioners,*

v.

BEAMAN WALTERS, *Respondent.*

Petition For Writ of Certiorari
To The Supreme Court
Of North Carolina

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTION PRESENTED

Is Section 97-63 of the North Carolina General Statutes unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

RULE 29.6 LISTING

Petitioner Algernon Blair, Inc. is a wholly owned subsidiary of Algernon Blair International, Inc. Petitioner Algernon Blair, Inc. does not own any nonwholly owned subsidiaries.

Petitioner United States Fidelity and Guaranty Company is a wholly owned subsidiary of USF&G Corporation. The only nonwholly owned subsidiaries of Petitioner United States Fidelity and Guaranty Company are: Ballston USF&G Holding Company, Inc.; JNO Industrial, Inc.; TNP Office, Inc.; and Afianzandora Insurgentes Serfin, S.A.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Algernon Blair and United States Fidelity and Guaranty Company petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina in this case.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court (App., *infra*, 1a) is reported at 344 N.C. 628, 476 S.E.2d 105 (1996). The opinion of the North Carolina Court of Appeals (App., *infra*, 2a-6a) is reported at 120 N.C. App. 398, 462 S.E. 2d 232 (1995). The opinion of the full North Carolina Industrial Commission (App., *infra*, 7a-12a) is unreported. The opinion of the Deputy Commissioner of the North Carolina Industrial Commission (App., *infra*, 13a-17a) is unreported.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on October 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This case may be subject to 28 U.S.C. § 2403(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that

> [n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.

Section 97-63 of the North Carolina General Statutes provides, in pertinent part, that

> [c]ompensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State,

provided no part of such period of two years shall have been more than 10 years prior to the last exposure.

STATEMENT OF THE CASE

Respondent Beaman Walters ("Walters") filed a claim for workers' compensation benefits alleging that he developed asbestosis while working with petitioner Algernon Blair. (R. 2). Petitioners denied Walters' claim, contending that Walters' last injurious exposure occurred with another employer and that Walters did not have the requisite amount of exposure to asbestos in North Carolina as required by N.C. Gen. Stat. § 97-63. (R. 5).

Deputy Commissioner Lawrence B. Shuping, Jr. of the North Carolina Industrial Commission heard this matter on May 17, 1993, in Raleigh, North Carolina. (Tr. 1). Walters was the only witness to testify at the hearing. Subsequent to the hearing, deposition testimony was taken from another lay witness, Mr. Keith Hayes. (R. 8). The parties stipulated to all of Walters' medical records in this matter. (Tr. Ex. at 5).

Walters worked many years as a welder and pipefitter. (Tr. 11). During his employment as a welder and pipefitter, Walters worked for multiple employers. Walters was exposed to asbestos during his career as a welder and pipefitter. As a result of this exposure, Walters developed asbestosis. (Tr. 11-31).

N.C. Gen. Stat. § 97-63 requires that Walters prove exposure to asbestos for a period of at least two years while employed in North Carolina, and that the two-year period come within ten years of Walters' "last injurious exposure." The Deputy Commissioner of the North Carolina Industrial Commission found that Walters' last injurious exposure occurred on December 21, 1980, while he was employed by Algernon Blair. (R. 14). During this time frame, Walters worked for Algernon Blair for a total of only *thirty-five* (35) days. (R. 14). Thus, the primary issue before the Deputy Commissioner was whether, counting his employment with Algernon Blair, Walters could show at least two years of exposure to asbestos in the State

of North Carolina during the ten-year period preceding December 21, 1980.

Based upon Walters' testimony, the Deputy Commissioner found that Walters' last "injurious exposure" was with Algernon Blair, but that Walters had not experienced two years of exposure within ten years of his exposure at Algernon Blair. Based upon these facts, the Deputy Commissioner filed an Opinion and Award on November 3, 1993, finding that Walters did not have the requisite exposure in North Carolina to recover workers' compensation benefits. (R. 10-15). The Deputy Commissioner held that Walters was not exposed to asbestos for two years in North Carolina during the 10-year period prior to his last injurious exposure, and denied Walters' claim pursuant to N.C. Gen. Stat. § 97-63. (R. 10-15).

Walters appealed to the full North Carolina Industrial Commission. (R. 16). On June 28, 1994, the Full Commission filed an Opinion and Award, affirming the decision by the Deputy Commissioner, and again denying Walters' claim pursuant to N.C. Gen. Stat. § 97-63. (R. 22-27). Like the Deputy Commissioner, the Full Industrial Commission expressly found that Walters had not been exposed to asbestos for two years in North Carolina during the 10-year period prior to December 21, 1980, – the date of his last "injurious exposure." (R. 13, 24-25).[1] Accordingly, the Full Commission denied Walters' claim because he failed to prove two years of exposure while working in North Carolina as required by N.C. Gen. Stat. § 97-63. (R. p. 2).

Following the Full Commission's decision, Walters appealed to the North Carolina Court of Appeals, arguing that N.C. Gen. Stat. § 97-63 denied him equal protection of the law under both the United States and North Carolina Constitutions. (R. 28). On October 3, 1995, the Court of Appeals entered a judgment,

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[1] The Commission's findings are supported by Walters' answers to discovery in which Walters essentially admits that he was not exposed to asbestos in North Carolina for the period of time required under N.C. Gen. Stat. § 97-63. (T. Exs. at 270, 274).

reversing the decision of the Industrial Commission and holding that N.C. Gen. Stat. § 97-63 was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. *Walters v. Algernon Blair*, 120 N.C. App. 398, 462 S.E. 2d 232 (1995). Purporting to apply the "rational basis" test developed by this Court, the Court of Appeals held that N.C. Gen. Stat. § 97-63 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution because the statute is impermissively "underinclusive" to the extent that asbestosis and silicosis are treated differently than other occupational diseases under the North Carolina Workers' Compensation Act. As support, the Court of Appeals cited only two cases, both from this Court and both of which evaluated statutes under the "strict scrutiny" standard of review, *see Walters*, 120 N.C. App. at 401, 462 S.E.2d at 234 (citing *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978) (applying strict scrutiny to statute which infringed upon the fundamental right to marry); *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) (applying strict scrutiny to state law which discriminated on the basis of alienage)), and a treatise on federal constitutional law, *see id.* (citing Laurence H. Tribe, *American Constitutional Law* § 16-4 (2d ed. 1988)).

On November 1, 1995, defendants filed an appeal as of right pursuant to N.C. Gen. Stat. § 7A-30(1). After briefing and oral argument, the North Carolina Supreme Court issued a per curiam opinion on October 11, 1996, summarily affirming the decision of the North Carolina Court of Appeals and remanding the case. *Walters v. Algernon Blair*, 344 N.C. 628, 476 S.E.2d 105 (1996) (per curiam).[2]

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[2] Upon remand, the only further act to be executed is entry of judgment in favor of respondent by the North Carolina Industrial Commission because respondent has satisfied the only remaining requirements to recovery: (1) development of asbestosis due to

REASONS FOR GRANTING THE WRIT

The courts below impermissibly imposed greater restrictions than permitted by this Court's "rational basis" standard of review under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to invalidate N.C. Gen. Stat. § 97-63. In Section 97-63, the North Carolina General Assembly established a minimum exposure requirement for recovery of workers' compensation benefits for those suffering from asbestosis or silicosis. Section 97-63 is part of the North Carolina Workers' Compensation Act -- a classic piece of social welfare legislation -- and similar provisions are found in other states' workers' compensation acts. In a decision summarily affirmed by the North Carolina Supreme Court, the North Carolina Court of Appeals held that N.C. Gen. Stat. § 97-63 is impermissibly "underinclusive" to the extent asbestosis and silicosis are treated differently than other occupational diseases under the North Carolina Workers' Compensation Act.

The Court should grant this petition for a writ of certiorari, or, in the alternative, summarily reverse the decision of the North Carolina Supreme Court for several reasons.[3] First, the decision

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occupational exposure to asbestosis, *Walters v. Blair*, No. 139165, slip op. at 5-6 (N.C. Indus. Comm'n June 28, 1994) (citing N.C. Gen. Stat. § 97-62); and (2) exposure to asbestos for at least thirty days while working for petitioner Algernon Blair, *id.* (citing N.C. Gen. Stat. § 97-57).

[3] There is no question as to whether this Court has jurisdiction to review the decisions below. Under *Michigan v. Long*, 463 U.S. 1032 (1983), when

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so. If a state court chooses to merely rely on federal

of the North Carolina Court of Appeals[4] directly conflicts with precedent of this Court in its application of rational basis review under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Second, the decision of the Court of Appeals is manifestly incorrect. Third, nearly identical statutes in several other states, as well as the countless number of workers' compensation statutes that distinguish among occupational diseases, are now susceptible to being held unconstitutional on federal equal protection grounds.

> precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment of opinion that the federal cases are being used only for guidance, and do not themselves compel the result that the court has reached.

Id. at 1040-41; *see also Ohio v. Robinette*, 117 S. Ct. 417, 420 & n.* (1996) (reaffirming *Long* and taking jurisdiction notwithstanding citation to both Ohio and Federal Constitutions).

Although the Court of Appeals cited both the United States Constitution and the North Carolina Constitution, it supported its decision exclusively with two decisions of this Court and a treatise on federal constitutional law. *See Walters*, 120 N.C. App. at 401, 462 S.E.2d at 234 (citing *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978); *Bernal v. Fainter*, 467 U.S. 216, 221 (1984); Laurence H. Tribe, *American Constitutional Law* § 16-4 (2d ed. 1988)). Thus, as in *Long*, the Court of Appeals rested its decision primarily on federal law. *Long*, 463 U.S. at 1043-44 (finding jurisdiction because state court relied exclusively on its understanding of federal cases despite its citations to state constitution). Furthermore, rather than making a "plain statement" to indicate any reliance on independent and adequate state grounds, the Court of Appeals explicitly acknowledged that the federal and state "courts have used the same test." *Walters*, 120 N.C. App. at 400, 462 S.E.2d at 234. Consequently, the Court possesses jurisdiction to review the erroneous application of federal constitutional law in this case.

[4] Because the North Carolina Supreme Court summarily affirmed the decision of the North Carolina Court of Appeals without opinion, this Petition discusses the opinion of the Court of Appeals.

I. The Decision of the North Carolina Court of Appeals Directly Conflicts with Precedent of this Court in its Application of Rational Basis Review under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

In striking down N.C. Gen. Stat. § 97-63 as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the North Carolina Court of Appeals applied the federal "rational basis" standard of review in a manner that directly conflicts with prior decisions by this Court. Although the Court of Appeals correctly stated that the "rational basis" standard should be used to evaluate the statute in question, the court actually and incorrectly applied "strict scrutiny" to invalidate N.C. Gen. Stat. § 97-63. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) ("[W]hen a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed."). In its misapplication of the "rational basis" test, the Court of Appeals held that N.C. Gen. Stat. § 97-63 was impermissibly "underinclusive" to the extent asbestosis and silicosis are treated differently than other occupational diseases under the North Carolina Workers' Compensation Act ("Act").

The decisions of this Court firmly establish that where a statute does not impact upon a suspect class or a fundamental right, it is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979). Statutes subject to this level of minimum scrutiny "will ordinarily survive an equal protection attack." *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457-58 (1988).

> The Constitution presumes that, absent some reason to fear antipathy, even improvident decisions will eventually be rectified by the democratic processes and that judicial intervention is generally unwarranted no

> matter how unwisely we may think a political branch has acted.

Vance, 440 U.S. at 97. Thus, under the rational basis test, the Court

> will not overturn . . . a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational.

Id. at 97.

Where there are reasonable facts on which the legislature *could have relied* in creating the classification the courts *will not* interfere with the legislature's decision. *Clover Leaf Creamery Co.*, 449 U.S. at 464. Thus, a statutory classification survives this analysis if it bears "some rational relationship to facts which could have been "conceived to be true by the governmental decision maker." *Vance*, 440 U.S. at 111 (emphasis added).

In the area of economic and social welfare legislation, a statute "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Where a classification has "some reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Id.* This Court has recognized that problems

> in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (citations omitted). This rule holds "even if it might have been wiser to take a larger step." *Califano v. Jobst*, 434 U.S. 47, 57 (1977). Thus,

> [e]ven if the classification involved . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that . . . "perfection is by no means required."

Vance, 440 U.S. at 108 (quoting *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960)).

In striking N.C. Gen. Stat. § 97-63 as unconstitutionally underinclusive, the North Carolina Court of Appeals completely ignored the relevant precedent of this Court. Although it acknowledged that the statute was subject only to rational basis review, the court proceeded to invalidate the statute as "grossly underinclusive in that it does not include all who are similarly situated." *Walters*, 120 N.C. App. at 401, 462 S.E.2d at 234. The court defined "similarly situated" to include "all other persons with occupational diseases." *Id.* Incredibly, the Court of Appeals failed to cite, let alone discuss, a *single* case in which a state statute was invalidated as "underinclusive" under the rational basis standard. Instead, in support of its holding, the Court of Appeals cited only two cases, *both* from this Court and *both* of which evaluated statutes under the "*strict* scrutiny" standard of review. *See id.* (citing *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978); *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)).

Neither *Zablocki v. Redhail*, 434 U.S. 374 (1978), nor *Bernal v. Fainter*, 467 U.S. 216 (1984), provides support for the decision of the Court of Appeals. *Zablocki* involved a challenge to a Wisconsin statute providing that members of a certain class of Wisconsin residents could not marry, within the State of Wisconsin or elsewhere, without first obtaining a court order granting permission to marry. *Zablocki*, 434 U.S. at 375. The class was defined to include any resident having minor issue not in his custody and which he was under obligation to support by any court order or judgment. *Id.* After an extensive review of its own precedent, this Court subjected the statute to strict scrutiny because the right to marry is fundamental under the Federal Constitution. *Id.* at 383-88. Consequently, the Court struck the statute because the classification was not "*closely tailored* to

effectuate only those interests" asserted by the State. *Id.* at 388 (emphasis added).

In *Bernal*, the petitioner, a resident alien working as a paralegal, challenged a Texas statute requiring public notaries to be citizens of the United States. *Bernal*, 467 U.S. at 218. After reviewing the facts and decisions below, the Court explained that it would apply strict scrutiny because the statute discriminated on the basis of alienage, a classification which, like nationality or race, is "inherently suspect." *Id.* at 219 & n.5. As a result, the Court invalidated the statute because its classification was not the "*least restrictive* means" available for furthering the state's compelling interests. *Id.* at 227-28 (emphasis added).[5] Thus, *Zablocki* and *Bernal* evaluated statutes under this Court's highest standard, strict scrutiny, rather than the lower standard of rational basis applicable here. Consequently, the only decisions upon which the Court of Appeals relied are completely inapposite to the issue which came before the court.

The *only* other authority cited by the Court of Appeals, Laurence H. Tribe, *American Constitutional Law* § 16-4 (2d ed. 1988), describes the concept of underinclusiveness. However, a complete review of the section cited by the Court of Appeals shows that the author is actually highly critical of those infrequent decisions in which a few courts have used the theory of underinclusiveness to invalidate statutes subject to rational basis review. The treatise approvingly notes that, "[i]n practice, only *rarely* does the Court invalidate underinclusive legislation as unconstitutionally arbitrary." *Id.* at 1447 n.4 (emphasis added).

In contrast to the decision of the Court of Appeals, this Court has routinely upheld under rational basis review social welfare statutes against challenges of underinclusiveness. *See,*

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[5] Although the Court determined that the proper standard of review was strict scrutiny, it is significant to note that the Fifth Circuit upheld the statute under rational basis review despite its underinclusive classification. *Id.* at 219 (citing *Vargas v. Strake*, 710 F.2d 190 (CA 5 1983)).

e.g., *Bowen v. Owens*, 476 U.S. 340 (1986) (affirming provision of Social Security Act which authorized payment of survivor's benefits to widowed spouse after age 60, but not to similarly situated divorced spouse); *Califano v. Boles*, 443 U.S. 282 (1979) (holding that denial of "mother's insurance benefits" to mother of illegitimate child who never married wage earner who fathered child bears rational relationship to government's desire to ease economic dislocation that occurs when wage earner dies and surviving parent must choose whether to stay home and care for child or go to work); *Califano v. Jobst*, 434 U.S. 47 (1977) (rejecting challenge to Social Security Act provision which continued child's insurance benefits for disabled dependent child who marries person who is eligible for Social Security benefits, but discontinued benefits for child who marries person who is ineligible to receive benefits); *Mathews v. DeCastro*, 429 U.S. 181 (1976) (upholding provision of Social Security Act according "wife's insurance benefits" to wives living with husbands, but not to divorced wives). In such cases, this Court has determined that "[i]f a fund of [the] magnitude" of a social welfare fund "is to be administered with a modicum of efficiency" deference to the "general rules" governing the fund is "essential. . . even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Jobst*, 434 U.S. at 53.

When viewed against the background of this Court's equal protection jurisprudence, the decision of the North Carolina Court of Appeals, as adopted by the North Carolina Supreme Court, is an egregious misapplication of rational basis standard developed by this Court to evaluate the constitutionality of a statute under the Equal Protection Clause. Failure to review the decision below will undermine this Court's equal protection jurisprudence, especially in light of the confusion generated by this Court's decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996). In his brief to the North Carolina Supreme Court, Walters quoted *Romer* for the proposition that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal

protection of the laws in the most literal sense." (Plaintiff-Appellee's New Brief at 14 (quoting *Romer*, 116 S. Ct. at 1628).) Whether the North Carolina Supreme Court's summary affirmance was prompted by an inference that *Romer* eased the rational basis standard is impossible to discern; nevertheless, the instant case provides a vehicle for this Court to re-establish the proper boundaries of rational basis review. Consequently, because the decision below directly conflicts with precedent of this Court on an important aspect of federal constitutional law, the Court should grant this petition for writ of certiorari, or, in the alternative, summarily reverse the decision of the North Carolina Supreme Court.

II. The Decision of the North Carolina Court of Appeals Is Manifestly Incorrect

"[I]t is up to legislatures, not courts, to decide upon the wisdom and utility of [economic and social welfare] legislation." *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Where the evidence is "at least debatable," a court may not substitute "its judgment for that of the legislature." *Clover Leaf Creamery Co.*, 449 U.S. at 469; *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-97 (1983). The evidence supporting North Carolina's minimum exposure requirement concerning silicosis and/or asbestosis is "at least debatable." Indeed, the decision of the North Carolina Court of Appeals is manifestly incorrect because N.C. Gen. Stat. § 97-63 is not underinclusive in any meaningful sense. Conceding that there were "legitimate state interests" served by N.C. Gen. Stat. § 97-63, the Court of Appeals mistakenly held that no justification exists for treating asbestosis and silicosis differently from all other occupational diseases, including those that "develop over time" such as "byssinosis." *Walters*, 120 N.C. App. at 401, 462 S.E.2d at 234. The Court of Appeals simply ignored the legislative history of the Act and the problems it has been intended to address, overlooked the significant differences between asbestosis and silicosis versus byssinosis, and consequently, misapplied the rational basis standard.

In 1935 when the North Carolina General Assembly adopted Section 97-63 and the other provisions of the Act dealing with asbestosis and silicosis, there were *compelling* reasons for distinguishing these two diseases from other occupational illnesses. Some thirty-five years later, the General Assembly elected to expand the coverage of the Act to include *all* diseases which are "characteristic of and peculiar to a particular trade, occupation, or employment." *See* N.C. Gen. Stat. § 97-53(13). There is absolutely nothing in equal protection jurisprudence that required the General Assembly to adopt the same remedies used for unique problems associated with asbestosis and silicosis when it decided to provide comprehensive coverage for all other occupational diseases even if some of them might be comparable to asbestosis or silicosis in some limited sense.

Under the express provisions of the Act as it was drafted in 1929, occupational diseases were not compensable. William Joseph Austin, Jr., *Provision of Workers' Comp Act Declared Unconstitutional, The Course and Scope Newsletter*, NCBA Workers' Compensation Section, Dec. 1995, at 2. ("Austin Article"). Despite this omission, in 1934 exposure to asbestos was deemed a compensable "accident" by the Supreme Court of North Carolina. See *McNeely v. Carolina Asbestos Co.*, 206 N.C. 568, 174 S.E. 509 (1934). In a 1935 article, the then Chairman of the Industrial Commission, Harry McMullan, described the many "unfortunate" events that transpired in North Carolina as a result of the ruling in *McNeely*. Insurance companies covering the risks for employers working with asbestos and silica dust gave the required ten days notice to come off of the risks. Many companies were unable to obtain insurance and thousands of workers lost their jobs. Harry McMullan, *Occupational Disease Compensation, Popular Government*, May-June 1935, at 4 ("McMullan Article").

In response to the crisis in several industries prompted by the decision in *McNeely*, in 1935 the General Assembly amended the Act to specifically designate 25 compensable diseases. 1935 N.C. Sess. Laws Ch. 123; N.C. Gen. Stat. § 97-53. *Only* those

diseases and conditions listed, including asbestosis and silicosis, were deemed compensable occupational diseases. 1935 N.C. Sess. Laws Ch. 123, Sec. 1; McMullan Article at 5. Over the years, only three other specific occupational diseases were added to the laundry list of compensable diseases. *See* 1953 N.C. Sess. Laws Ch. 1112 (undulant fever) (N.C. Gen. Stat. § 97-53 (27)); 1957 N.C. Sess. Laws Ch. 1396, sec. 6 (psittacosis) (N.C. Gen. Stat. § 97-53 (26)); 1971 N.C. Sess. Laws. Ch. 1108 (loss of hearing) (N.C. Gen. Stat. § 97-53 (28)).

When occupational diseases were first expressly recognized as compensable events in 1935, it was generally accepted that asbestosis and silicosis were "[t]he most important and dangerous diseases." McMullan Article at 5. Silicosis and asbestosis are both diseases of the lungs contracted respectively by exposure to silica dust and asbestos. *Young v. Whitehall Co.*, 229 N.C. 360, 365, 49 S.E.2d 797, 800 (1948). The two diseases have "similar symptoms and consequences" including "shortness of breath, decreased chest expansion, lessened capacity for work, reduced vitality, and a marked susceptibility to tuberculosis." *Id.* The diseases are "progressive" in that "lung changes" continue to develop "after complete removal of the worker from the hazard." *Id.* Whether either disease will result "in death or disability to a particular worker is dependent on his susceptibility" to either disease as well as "the duration and intensity of his exposure." *Id.* The average time "before symptoms of the disease begin to develop is from *ten to fifteen years*." *Id.* (emphasis added).

"A proper consideration" of the Workers' Compensation Act "must rely upon the conviction that" in making specified diseases compensable, the General Assembly "gave due heed to the nature" of asbestosis and silicosis. *Id.* Because of their unique and dangerous qualities, several provisions of the Act, including Section 97-63, mandate unique remedies for these two diseases. For example, pursuant to N.C. Gen. Stat. § 97-60, employees and prospective employees engaged or about to engage in an occupation that will expose them to asbestos or silica may be compelled to submit to a medical examination. For new

employees, the purpose of the examination is to determine whether they are already "affected by" asbestosis or silicosis or otherwise "susceptible" to the disease. *Id.* The examinations are conducted under the authority of an Advisory Medical Committee, especially established to deal with the problems associated with asbestosis and silicosis. *See* N.C. Gen. Stat. § 97-72. Any employee who refuses to submit to such an examination is barred from seeking compensation or other benefits in the event they contract either disease. N.C. Gen. Stat. § 97-60.

Employees who are found to have asbestosis or silicosis must submit to a series of three compulsory examinations by the Advisory Medical Committee within a two-year time frame. N.C. Gen. Stat. §§ 97-61.1 to 61.4. A hearing must be held following the first medical report. If the employee has asbestosis or silicosis, the Industrial Commission may "order" the employee's removal from any occupation that exposes the employee to asbestos or silica dust. N.C. Gen. Stat. § 97-61.5. Any employee so removed is entitled to 104 weeks of benefits equal to two-thirds of the employee's average weekly wage before removal.[6] Following the third medical examination, the Industrial Commission will make a final ruling on any compensation the employee should receive in addition to the 104 weeks already received. N.C. Gen. Stat. § 97-61.6. When the incapacity for work is found to be either total or partial, disability will be paid in accordance with the general disability provision found at N.C. Gen. Stat. § 97-29. *Id.*

Notwithstanding the obvious and equitable policies furthered by both the 1935 amendments and the General Assembly's special plan for addressing asbestosis and silicosis, the Act continued to

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[6] The purpose of this section is to encourage employees to remove themselves from hazardous exposure and to obtain rehabilitation. *Roberts v. Southeastern Magnesia and Asbestos Co.*, 61 N.C. App. 706, 710, 301 S.E.2d 742, 744 (1983). No comparable remedy is available under the Act for any other occupational injury or illness.

have shortcomings in the area of occupational diseases. "The great disadvantage" of the Act's "schedule-type coverage" for occupational diseases was "its failure to keep pace with the development of new disabling exposures in the industrial process." *Booker v. Duke Medical Ctr.*, 297 N.C. 458, 468, 256 S.E.2d 189, 196 (1979). Although the "schedule method" was widely used by other states when the Act was originally enacted, "the definite trend has been toward expansion into general coverage, either by abandoning the schedule altogether or by leaving the list intact while providing for coverage of all other occupational diseases." *Id.* (citing 1B A. Larson, *Workmen's Compensation Law* § 41.20 (1978)).

Consistent with the modern trend, in 1971, the General Assembly amended the Act by adopting the current version of N.C. Gen. Stat. § 97-53 (13). 1971 N.C. Sess. Laws Ch. 547. The General Assembly elected to retain its original "schedule," but added a new section providing that any *unspecified* occupational disease would be compensable upon proof that it was "due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed." *Id.*[7] In providing broader coverage for all occupational diseases, the General Assembly did not adopt for those diseases the same remedies or restrictions applicable to asbestosis or silicosis. This omission was both intentional and necessary because the purpose of the 1971 amendment was to provide coverage for occupational diseases, unique to particular industries, as they became known to the various industries or the Industrial Commission. The legislative establishment of specific remedies for unspecified and possibly unknown diseases would

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[7] In those cases involving the condition of byssinosis, any award of benefits has been granted pursuant to this section. *See, e.g., Hansel v. Sherman Textiles*, 304 N.C. 44, 51-54, 283 S.E.2d 101, 105-107 (1981); *Peoples v. Cone Mills Corp.*, 69 N.C. App. 263, 317 S.E.2d 120 (1984), *modified on other grounds*, 316 N.C. 426, 342 S.E.2d 798 (1986).

have been both impossible and self-defeating because the primary purpose of the 1971 amendments was to provide more flexible coverage than what could be obtained through the listing of specific illnesses. *Booker*, 297 N.C. at 468-469, 256 S.E. 2d at 196.

Despite the important interests served by the Legislature's decision to provide compensation for occupational illnesses, the General Assembly also never "intended" for the Act to serve as "a general accident and health insurance act." *Morrison v. Burlington Indus.*, 304 N.C. 1, 11, 282 S.E.2d 458, 466 (1981). Evidence of causation is the *one* limitation that "protects" the Act "from being converted into a general health and insurance benefit act." *Booker*, 297 N.C. at 475, 256 S.E.2d at 200. Allowing awards for occupational illnesses "'in nowise relaxed the fundamental principle which requires proof of causal relation between injury and employment.'" *Id.* (citing *Duncan v. Charlotte*, 234 N.C. 86, 91, 66 S.E.2d 22, 25 (1951)). Thus, no award for an occupational disease may "'be sanctioned unless it be shown that the disease was incident to or the result of the particular employment in which the workman was engaged.'" *Id.*

The importance of a proximate cause limitation to awards for occupational illnesses is matched only by the difficulty in fashioning an appropriate standard for applying this restriction. The North Carolina Workers' Compensation Act is based upon the "injury by accident" model used under British law to describe the type of event covered by the Act. *Booker*, 297 N.C. at 468, 256 S.E.2d at 196 (citing Note, *Development of North Carolina Occupational Disease Coverage*, 7 Wake Forest L. Rev. 341, 342 (1971)). A causal link is far easier to identify when an injury results from a specific accident as opposed to exposure to a substance over a period of time. *Id.* As noted by the North Carolina Supreme Court, "the manner in which disability is brought about by an occupational disease is so inherently different . . . it is sometimes difficult to administer the law with respect to such disease under machinery adopted for . . . administering claims growing out of ordinary accidents."

Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 476, 70 S.E.2d 426, 429 (1952). Under these circumstances, when the Legislature has required industry to bear the "proper expense" of occupational illnesses, "it becomes the *duty of the courts to give effect to obvious legislative intent*" concerning all of the elements plaintiffs must establish to receive compensation. *Id.*

In the typical occupational disease case, the plaintiff must submit evidence that "something in the workplace helped to bring about the disease which, in turn, caused the incapacity for work for which compensation is sought." *Wilkins v. J.P. Stevens & Co.*, 333 N.C. 449, 453, 426 S.E.2d 675, 678 (1993). For claims under Section 97-53(13), the plaintiff satisfies this element upon proof that the "occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 102, 301 S.E.2d. 359, 370 (1983). To hold a particular employer liable, a plaintiff must also prove the identity of the employer "in whose employment" he or she "was last injuriously exposed to the hazard." N.C. Gen. Stat. § 97-57. In order to satisfy this element, a plaintiff must prove that the exposure in question "augmented" the disease process to any degree. *Caulder v. Waverly Mills*, 314 N.C. 70, 74, 331 S.E.2d 646, 648 (1985); *Cain v. Guyton*, 79 N.C. App. 696, 701, 340 S.E.2d 501, 505, *aff'd*, 318 N.C. 410, 348 S.E.2d 595 (1986); *Gay v. J.P. Stevens & Co.*, 79 N.C. App. 324, 331, 339 S.E.2d 490, 494 (1986).

The issue of causation is handled in an entirely different manner for the diseases of asbestosis and silicosis. First, an exposure to asbestos or silica dust "for as much as 30 working days, or parts thereof, within seven consecutive calendar months" is *deemed injurious*. N.C. Gen. Stat. § 97-57. The effect of this section is to create an irrebuttable legal presumption. *Barber v. Babcock & Wilcox Constr. Co.*, 101 N.C. App. 564, 565, 400 S.E.2d 735, 736, *rev. allowed*, 328 N.C. 569, 403 S.E.2d 506 (1991). Thus, no other evidence need be submitted by a plaintiff

to hold a particular employer liable other than length of employment. The only other evidence related to proximate cause that a plaintiff must offer relates to the statute challenged in this legislation, *i.e.*, that the plaintiff has been exposed to asbestos or silica dust "in employment for a period of not less than two years in this State, provided no part of such period of two years shall have been more than ten years prior to [his] last exposure." N.C. Gen. Stat. § 97-63. Unlike other occupational diseases, plaintiffs seeking benefits for asbestosis or silicosis are not required to offer any additional evidence showing a "causal connection between the disease and the employment" and their occupational illness. *Hansel*, 304 N.C. at 52, 283 S.E.2d at 106. Instead, for those employees who are diagnosed as having asbestosis or silicosis, a causal link with their employment in North Carolina is presumed upon proof that satisfies N.C. Gen. Stat. §§ 97-57 and 97-63.

It was rational for the General Assembly to address the proximate cause issue for the diseases of asbestosis and silicosis by requiring proof of certain minimum exposures. Because of the numerous variables associated with these two diseases, including the extended latency period before symptoms become evident, it is often impossible to know when or where a particular employee contracted these diseases. *See Young*, 229 N.C. at 365, 49 S.E.2d at 800. The difficult proximate cause issues created by these diseases further cloud the already complicated issue of which employer should be held responsible for a particular employee's occupational illness. *Booker*, 297 N.C. at 482-83, 256 S.E.2d at 204 (explaining that the "injury-by-accident" model adopted by the Act cannot be used for occupational diseases that "are not the result of a single incident but rather of prolonged exposure to hazardous conditions or disease-causing agent"). The combined effect of N.C. Gen. Stat. §§ 97-57 and 97-63 is to "eliminate the need for complex and expensive litigation" over the issue of proximate cause and any "relative contribution[s]" that could or should be made by different employers by which a claimant might have been exposed to hazardous conditions.

Frady v. Groves Thread, 56 N.C. App. 61, 64, 286 S.E.2d 844, 846 (1982), *aff'd*, 312 N.C. 316, 321 S.E.2d 835 (1984). That some employers whose place of employment may have contributed to the disease might escape liability, or that other employers may bear a disproportionate share of the total liability, "is a problem for the legislature, not the courts, to consider." *Frady*, 56 N.C. App. at 64-65, 286 S.E.2d at 846-47 (citing *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 170, 22 S.E.2d 275, 279 (1942)).

The superior benefits and stronger precautions provided by the General Assembly to victims of asbestosis and silicosis were intentionally limited to those situations in which plaintiffs could satisfy the exposure requirements of N.C. Gen. Stat. §§ 97-57 and 97-63. As to these two diseases, judicial invalidation of either exposure requirement will impermissibly transform the Act into a "general accident and health insurance act" for claimants who have contracted asbestosis and silicosis, regardless of whether the conditions that led to their disease bear any rational relationship to the State of North Carolina or the employers obligated to pay their claims. *Morrison*, 304 N.C. at 11, 282 S.E.2d at 466.

Other governmental interests served by Section 97-63 include the prevention of forum shopping and the economic interest of ensuring that North Carolina employers are not burdened with workers' compensation claims for which they are not responsible.[8] As noted in *Honeycutt*, asbestosis and silicosis cases are rationally distinguished from many other occupational diseases. The General Assembly was concerned with the need to protect North Carolina businesses from burdensome liability to individuals with little or no exposure in this State. Section 97-63 operates to ensure that employees claiming benefits will have had

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[8] These interests were acknowledged by the Court of Appeals in its decision purporting to strike Section 97-63 under the rational basis test. *Walters*, 120 N.C. App. at 401, 462 S.E.2d at 234.

some rational relationship to the employers ultimately being held responsible for any such claims.[9]

Given the unique qualities of asbestosis and silicosis, it is not surprising that numerous other states have similar "minimum exposure" requirements. Pennsylvania has a statute very similar to Section 97-63. *See* Pa. Stat. Ann. tit. 77, §§ 412, 1401(d) (1992). In this case, Walters worked in Pennsylvania for approximately five years in the 1970's, and would have easily met that state's exposure requirement. (T. Exs. at 274). Arkansas, Idaho, Kansas, Nevada and South Dakota also have "minimum exposure" requirements.[10] Like North Carolina, these other states have enacted minimum exposure provisions to prevent forum shopping and to ensure that claimants receiving benefits for asbestos and silica exposure have a reasonable relationship to those employers who are obligated by statute to pay the costs. In the absence of N.C. Gen. Stat. § 97-63 and other similar statutes, claimants could pick and choose the state that had the most favorable workers' compensation law and receive benefits even if their exposure in that state was extremely minimal.[11]

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[9] In the present case, Walters had the majority of his exposure during the relevant period of time in other states, particularly Pennsylvania and Maryland. *See Walters v. Algernon Blair, Inc.*, No. 139165, slip op. at 2 (N.C. Indus. Comm'n June 28, 1994). It is certainly logical, fair, and rational for the General Assembly to have concluded that plaintiffs like Walters should pursue their claims in states that bear a more significant relationship to the development of their condition than does North Carolina.

[10] Ark. Code Ann. § 11-9-602(b) (Michie 1996); Idaho Code § 72-443 (1989); Kan. Stat. Ann. § 44-5a10 (1993); Nev. Rev. Stat. § 617.460(4) (1996); S.D. Codified Laws Ann. § 62-8-14 (1993).

[11] For example, claimants arguably can now receive benefits in North Carolina if they meet the minimum requirement for "injurious exposure" under N.C. Gen. Stat. § 97-57, even if their work in North Carolina over the preceding ten years did not exceed thirty days within the preceding seven calendar months required by that statute. *Id.* This irrational consequence of the Court of Appeals' decision makes no sense in light of the extended duration and intensity of exposure to asbestos or silica

When occupational illnesses were added to the list of compensable events by the General Assembly in 1935, no one disputed the differences between asbestosis and silicosis as compared to the other specific diseases included as compensable illnesses. When compared against the diseases originally covered by the Act, it was not only rational -- it made obvious good sense -- to both provide for greater benefits for asbestosis and silicosis and to require a minimum exposure element to take the place of the typical proximate cause element. *See Young*, 229 N.C. at 365-66, 49 S.E.2d at 801. However, until the Act was amended in 1971, only those specific diseases listed in the Act were considered compensable. Thus, under the faulty theory used by the Court of Appeals, and adopted by the North Carolina Supreme Court, the addition of specific occupational diseases to the Act should have been immediately declared unconstitutional in 1935 because it was "underinclusive" to cover some diseases while excluding others. This would, of course, produce a ludicrous result in several respects. None of the many workers' compensation acts throughout the country have ever been challenged, much less stricken, under such a novel theory. Further, the nature of occupational illness is such that no legislature in 1935 or even today can name with certainty each and every potential occupational illness that might afflict a particular employee. Under the approach followed by the Court of Appeals, a legislature could never safely tailor a particular compensation scheme for *any* specific occupational illnesses. Any such statute might be found underinclusive at some unspecified point in the future if the legislature failed to name all of the specific occupational diseases that should have been known to it or those that were discovered after coverage for specific diseases was established.

Ironically, the faulty logic of the Court of Appeals is premised on the enlightened decision by the North Carolina

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dust typically required before employees manifest the symptoms of either disease. *Young*, 229 N.C. at 365, 49 S.E.2d at 800.

General Assembly in 1971 to provide comprehensive coverage for all occupational illnesses, including those that either were not or could not be specified in 1971. *See* N.C. Gen. Stat. § 97-53(13). In addition to those diseases specifically catalogued by the General Assembly, "an occupational disease can still be compensable when it is proven to be due to causes and conditions which are characteristic of . . . a particular trade, occupation, or employment, but excluding all ordinary diseases of life to which the general public is equally exposed." *Id.* The "clear intent" of the General Assembly in enacting Section 97-53(13) was to provide "comprehensive coverage for occupational diseases" including those diseases not specifically known or understood by the General Assembly at the time it enacted this section. *Booker*, 297 N.C. at 468-69, 256 S.E.2d at 196.

Byssinosis is an excellent example of an occupational illness that was not understood by the General Assembly when it amended the Workers' Compensation Act in 1971, but which can be covered where the evidence in a particular case satisfies the requirements of Section 97-53 (13). *See Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 641, 256 S.E.2d 692, 696 (1979) ("The causes and development of byssinosis, and the structural and functional changes produced by the disease, are still the subject of scientific debate. This Court has *never before* considered a case involving byssinosis, and our research discloses only a handful of such cases from other jurisdictions.") (emphasis added); *Peoples v. Cone Mills Corp.*, 69 N.C. App. 263, 317 S.E.2d 120 (1984), *modified on other grounds*, 316 N.C. 426, 342 S.E.2d 798 (1986) (byssinosis, as a component of chronic obstructive pulmonary disease, is a compensable occupational disease under N.C. Gen. Stat. § 97-53 (13)).

In 1935, the General Assembly was very familiar with the diseases of asbestosis and silicosis. It understood the unique problems associated with each disease and was able to craft a specific and targeted legislative remedy. The General Assembly's different treatment for these two diseases was and is extremely rational given the qualities of asbestosis and silicosis and when

these two diseases are compared to other compensable diseases specified in the 1935 amendments. In contrast, the General Assembly in 1971 could not craft a similar specific plan for byssinosis -- or include byssinosis within the framework applicable to asbestosis or silicosis -- because the General Assembly *did not even know that byssinosis existed, much less that it was an occupational disease*. For the Court of Appeals to invalidate only one provision of the statutory framework applicable to asbestosis and silicosis, simply because byssinosis was not included in the framework -- either in 1935 or 1971 -- expects the impossible of the General Assembly and completely misses the point of the 1971 amendments. *See Booker*, 297 N.C. at 468-69, 256 S.E.2d at 189 (N.C. Gen. Stat. § 97-53 (13) was enacted "to keep pace with the *development* of *new* disabling exposures in the industrial process") (emphasis added).

The decision by the Court of Appeals, and its rather flippant and unsupported conclusion that persons with byssinosis are "similarly situated" to persons with asbestosis or silicosis also misapprehends several significant distinctions between these diseases. *See Walters*, 120 N.C. App. at 401, 462 S.E.2d at 234. Unlike the specific diseases of asbestosis and silicosis, the term "'byssinosis' refers simply to the effect, if any, of a worker's exposure to cotton dust in the worker's overall pulmonary function." *Hansel*, 304 N.C. at 61-62, 283 S.E.2d at 111 (Exum, J., concurring). Correctly understood, exposure to cotton dust can be "a significant causal factor" in an employee's development of chronic obstructive pulmonary disease. *Wilkins*, 333 N.C. at 452, 426 S.E.2d at 677 (citing *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 369-70). However, a "crucial difference" between byssinosis versus asbestosis or silicosis is that, "[t]he effects of cotton dust exposure (byssinosis) are indistinguishable from the effects of other kinds of lung problems such as bronchitis, or the effects of cigarette smoking; whereas the effects of silicosis and asbestosis are identifiable by biopsy or an autopsy." *Hansel*, 304 N.C. at 62, 283 S.E.2d at 111 (Exum, J., concurring). Thus, contrary to the conclusion of the Court of Appeals, these diseases

are not at all comparable and victims of each disease are not similarly situated.

Another difference between these two diseases relates to the typical workplace in which the respective hazards are found. Construction workers and miners are the employees most commonly exposed to asbestos and silicosis. Both of these trades tend to be project specific. For example, in this case Walters has implied that he has always been a North Carolina resident, (Brief of Plaintiff to the Court of Appeals at 3), yet he could not show even two years of exposure in North Carolina during the ten years immediately proceeding his last exposure. The workplace in construction and mining often changes from year to year, if not month to month or week to week, thus making it even more difficult than in other occupational disease cases to identify an employer who reasonably should or can be held accountable for an employee's disability. In contrast, most cases of alleged byssinosis involve employees who worked for a particular employer for an extended duration, or a combination of employers located at readily identifiable locations in North Carolina. *See, e.g., Peoples*, 69 N.C. App. at 264, 317 S.E.2d at 121 (involving plaintiff alleging claim for cotton dust exposure employed by the same company at the same mill located in North Carolina for twenty-four years). These distinctions alone made it rational for the General Assembly to require that a particular employee with asbestosis or silicosis prove a minimum amount of actual exposure to the hazards of asbestos or silica dust in the State of North Carolina. Absent this requirement, employers in North Carolina will be transformed into "general insurers" for any employee with asbestosis or silicosis regardless of whether the exposures that actually caused the employee's illness were reasonably related to the employee's work in North Carolina. *Morrison*, 304 N.C. at 11, 282 S.E.2d at 466.

These serious and significant differences between asbestosis and silicosis versus byssinosis, standing alone, would justify the different treatment mandated by the General Assembly for these diseases. However, even if the diseases were more similar than

different, nothing under the Equal Protection Clause obligates the General Assembly to treat identically these or other occupational diseases.

Government at its essence is "the science of experiment." *Sailors v. Board of Educ.*, 387 U.S. 105, 111 (1967) (quoting *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 226 (1821)). As noted by one of the three authorities cited by the Court of Appeals, while allegedly underinclusive legislation may, in some sense, fail to include all who appear similarly situated, "piecemeal legislation is a pragmatic means for effecting needed reforms, where a demand for completeness may lead to total paralysis." *Tribe, supra*, at 1447. No state is obligated "to deal with all classes or to strike at all evils at the same time or in the same way." *Id.* (citing *Semlar v. Dental Examiners*, 294 U.S. 608, 610 (1935)). That the North Carolina Legislature provided "different remedies" for the "evils" of different occupational diseases, does not render these remedies invalid because the Legislature may legitimately "take one step at a time addressing itself to the phase of the problem which seems most acute." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

Should Walters ultimately prevail, the ruling in this case will cast grave doubt as to the continuing validity of those other provisions of the Workers' Compensation Act directed towards asbestosis and silicosis. Without regard to the unfairness to those employers upon whom this new, and unrestricted, liability will rest, employees with other occupational illnesses will now be able to challenge the Act's other special provisions for asbestosis and silicosis as being "underinclusive." If there is no longer any rational basis for treating asbestosis and silicosis differently for purposes of requiring minimum exposures as a condition to recovery, there is likewise no rational basis for depriving employees with byssinosis of the remedy of removal from a workplace full of cotton dust with a corresponding right to receive 104 weeks of benefits. Prospective employees and current employees who might already have asbestosis and silicosis will be able to challenge the Act's compulsory examination

requirements. Under the Court of Appeal's theory, that provision is also underinclusive to the extent compulsory examinations are not required for employees who might have other occupational illnesses before they start a job that might expose them to an aggravating hazard or condition. Finally, employees with other occupational illnesses will be able to argue that their exposure to a particular substance should be deemed injurious after they have been exposed for thirty days in seven calendar months because limiting that presumption to asbestosis and silicosis is also underinclusive.

That Section 97-63 operates in this case to deny Walters' claim for benefits under North Carolina law is not a sufficient reason for the Court of Appeals to substitute its judgment for the General Assembly's concerning a rational plan for dealing with asbestosis claims. Although Walters should not receive benefits in this case, it is clear that N.C. Gen. Stat. §§ 97-57 and 97-63 operate to allow asbestosis and silicosis claimants to recover benefits when benefits would be denied for other occupational diseases. For example, in *Wilkins*, the plaintiff claimed that he had been rendered completely disabled because of his exposure to cotton dust. The plaintiff worked for the same employer and at the same mill from the 1950's through 1986. Despite his undisputed physical impairment, the plaintiff's claim was denied because of the absence of evidence showing that "his exposure to cotton dust was causally related to [his] incapacity. " *Wilkins*, 333 N.C. at 455, 426 S.E.2d at 679.

If the plaintiff in *Wilkins* had been exposed to asbestos instead of cotton dust, and if all of the other facts were the same, *i.e.*, employment in North Carolina for twenty-six years with constant exposure to the hazard, the plaintiff would have received benefits by virtue of Sections 97-57 and 97-63. Similarly, if the Legislature had elected to apply these two statutes to claims of byssinosis, the plaintiff would have recovered regardless of his inability to provide expert testimony actually linking his occupational exposure to his disease. That the General Assembly has selected one method for linking exposure to asbestos and

silica dust to North Carolina workplaces and a different method for proving the same element for other occupational illnesses does not render either method irrational or unconstitutional. Judicial enforcement of Section 97-63 in this case may not seem to be "fair" to Walters. Yet the Court must also consider the hundreds, if not thousands of claimants who "unfairly" have received benefits from North Carolina employers by virtue of Section 97-63, in those instances where they would have been unable to prove a causal link between their employment in North Carolina and the disease of asbestosis.

Section 97-63 of the North Carolina General Statutes is a rational way to deal with the difficult issue of proximate cause in cases of asbestosis and silicosis and cannot be struck down on federal constitutional grounds simply because the North Carolina appellate courts did not like the result in this particular case. Consequently, the Court should grant this petition for writ of certiorari, or, in the alternative, summarily reverse the decision of the North Carolina Supreme Court.

III. Nearly Identical Statutes in Several Other States, as Well as the Countless Number of Workers' Compensation Statutes That Distinguish among Occupational Diseases, Are Now Susceptible to Being Held Unconstitutional on Federal Equal Protection Grounds

Workers' Compensation acts, like other forms of social welfare legislation at the state and federal levels, involve complex statutory schemes designed to compensate vast numbers of claimants afflicted with an array of disabilities. In enacting these statutory schemes, legislatures have made choices about how to compensate claimants suffering from different diseases based on their perceptions of the various causes, characteristics, and effects of each type or category of disease. The large number of state statutes making such disease-based distinctions, even among pulmonary disorders, is virtually impossible to count. If the decision of the North Carolina Court of Appeals, as adopted by the North Carolina Supreme Court, is permitted to stand, these

complicated statutory remedies will be vulnerable to piecemeal revision by courts laboring under an erroneous theory of federal equal protection jurisprudence.

North Carolina is one of many states that differentiates among occupational diseases in its imposition of requirements for recovery. For example, at least eight states have "minimum exposure" requirements for asbestosis, silicosis, or other pulmonary occupational diseases similar to that found in N.C. Gen. Stat. § 97-63.[12] Like North Carolina, these other states have enacted minimum exposure provisions to prevent forum shopping and to ensure that claimants receiving benefits for asbestos and silica exposure have a reasonable relationship to those employers who are obligated by statute to pay the costs. Numerous states have also enacted statutes of limitations that vary according to the type of pulmonary occupational disease alleged by a claimant.[13] Similarly, many states restrict compensation based on a permissible manifestation period that varies according to the type of pulmonary occupational disease.[14] In fact, the categories of statutes that differentiate on the basis of

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[12] *See, e.g.*, Ark. Code Ann. § 11-9-602(b) (Michie 1996); Idaho Code § 72-443 (1989); Iowa Code Ann. § 85A.13(2) (West 1996); Kan. Stat. Ann. § 44-5a10 (1993); Nev. Rev. Stat. § 617.460(4) (1996); Pa. Stat. Ann tit. 77, §§ 412, 1401(d) (1992); S.C. Code Ann. § 42-11-60 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 62-8-14 (1993).

[13] *See, e.g.*, Ark. Code Ann. § 11-9-702(a)(2) (Michie 1996); Ga. Code Ann. § 34-9-281(b)(2) (1992); Idaho Code § 72-448 (1989); Ill. Ann. Stat. ch. 820, paras. 305/6(d), 310/6(c) (Smith-Hurd 1993); Nev. Rev. Stat. § 617.460(2) (1996); Va. Code Ann. § 65.2-406(A) (Michie 1995).

[14] *See, e.g.*, Ark. Code Ann. §§ 11-9-601(g)(1)(B), 11-9-702(a)(2) (Michie 1996); Idaho Code § 72-439 (1989); Ill. Ann. Stat. ch. 820, para. 310/1(f) (Smith-Hurd 1993); Ind. Stat. Ann. § 22-3-7-9(f) (Burns Supp. 1996); Iowa Code Ann. § 85A.12 (West 1996); Kan. Stat. Ann. § 44-5a01(c) (1993); Me. Rev. Stat. Ann. §§ 609, 614.5 (West Supp. 1996).

the occupational disease alleged by claimants are so numerous as to preclude an exhaustive listing here.

The premise underlying the decision of the North Carolina Court of Appeals -- that the Equal Protection Clause mandates that all occupational diseases be treated identically -- dooms a countless array of workers' compensation laws enacted by legislatures across the United States. Despite this Court's insistence that the Equal Protection Clause does not permit courts to interfere with a legislature's decision where there are reasonable facts upon which the legislature could have relied in creating a particular classification, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), the decision of the Court of Appeals will enable any claimant, who has been denied benefits based on a requirement specific to his disease, to argue that his legislature's reasoned judgment can not survive even the lowest level of scrutiny under the United States Constitution. In light of the large number of statutes jeopardized by the underlying rulings, the Court should grant this petition for writ of certiorari, or, in the alternative, summarily reverse the decision of the North Carolina Supreme Court.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant the petition for writ of certiorari, or, in the alternative, summarily reverse the decision of the North Carolina Supreme Court.

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JANUARY 1997

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

BEAMAN WALTERS,	)	
	)	FILED OCTOBER 11, 1996
Employee,	)	IN THE OFFICE OF
Plaintiff;	)	CLERK SUPREME COURT
	)	OF NORTH CAROLINA
v.	)	
	)	
	)	
ALGERNON BLAIR,	)	
Employer;	)	No. 462A95 - Industrial
	)	Commission
UNITED STATES	)	
FIDELITY AND	)	
GUARANTY	)	
COMPANY,	)	
Carrier,	)	
Defendants.	)	

Appeal of right by defendants pursuant to N.C.G.S. § 7A-30(1) from the decision of the Court of Appeals, 120 N.C. App. 298, 462 S.E.2d 232 (1995), reversing an order of the North Carolina Industrial Commission and holding that N.C.G.S. § 97-63 violates the Constitution of the United States and the North Carolina Constitution. Heard in the Supreme Court 11 September 1996.

Robin E. Hudson and Faith Herndon for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by Thomas A. Farr and Paul D. Holthausen, for defendants-appellants.

PER CURIAM.

Affirmed.

APPENDIX B

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 1995

BEAMAN WALTERS,
Employee,
Plaintiff;

FILED 95 OCT - 9 A.M. 7:48

v.

From North Carolina
Industrial Commission
I.D. File No.: 139165

ALGERNON BLAIR,
Employer;

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award For the Full Commission entered 28 June 1994. Heard in the Court of Appeals 30 August 1995.

The Law Offices of Robin E. Hudson, by Robin E. Hudson and Faith Herndon, for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by Jack S. Holmes and John D. Elvers, for defendant-appellees.

GREENE, Judge.

Pursuant to N.C. Gen. Stat. § 97-86, Beaman Walters (plaintiff) appeals from an Opinion and Award of the Industrial Commission (Commission) entered 28 June 1994, which adopted the Deputy Commissioner's findings and conclusions contained

in its Opinion and Award entered 3 November 1993, and denied plaintiff's claim for worker's compensation benefits.

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Plaintiff has worked as a welder and pipe fitter most of his life until he retired in 1985. As a welder and pipe fitter, plaintiff worked for multiple employers and was exposed to asbestos throughout his career. As a result of this exposure, plaintiff has been diagnosed as having asbestosis. Plaintiff's last exposure to asbestos was while he was employed by Algernon Blair (defendant). Plaintiff worked for defendant thirty-five days, from 17 November 1980 to 21 December 1980, at which time he was exposed to asbestos on a daily basis.

The Commission found as a fact that the plaintiff "has not been exposed to the hazards of inhalation of asbestos dust for a period of not less than two years in the State of North Carolina during the ten years prior to his last exposure to the hazards of the same disease while working for defendant-employer in December of 1980." The Commission concluded that the plaintiff had "developed asbestosis" "[a]s a result of exposure to asbestos dust during his many years of work in the construction trade as a pipe welder." The Commission, however, denied plaintiff's claim because he was not exposed, as required by N.C. Gen. Stat. § 97-63, to asbestos dust for a period of at least two years "in North Carolina during the ten years prior to his last exposure." The plaintiff argued before the Commission that N.C. Gen. Stat. S 97-63 was unconstitutional and therefore could not be used to deny him compensation.

-3-

The dispositive issue is whether N.C. Gen. Stat. § 97-63 is constitutional.

N.C. Gen. Stat. § 97-63 provides:

Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State, provided no part of such period of two years shall have been more than 10 years prior to the last exposure.

N.C.G.S. § 97-63 (1991). The plaintiff argues that this statute denies him equal protection of the law under both the North Carolina Constitution and the United States Constitution in that it treats persons with asbestosis differently than persons with other occupational diseases and does so without any valid reason. We agree.

The principle of equal protection of the law is explicit in both the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the Constitution of North Carolina, *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971), and requires that all persons similarly situated be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 798, *reh'g denied*, 458 U.S. 1131, 73 L. Ed. 2d 1401 (1982). In evaluating the constitutionality of challenged classifications under the federal and state constitutions, our courts have used the same test. *Duggins v. Board of Examiners*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978). If the statute impacts upon a suspect class or a fundamental right, the government must "demonstrate that the

classification is necessary to promote a compelling governmental interest" (strict scrutiny). *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). If the statute does not impact upon a suspect class or a fundamental right, it is only necessary to show that the classification created

by the statute bears a rational relationship to or furthers some legitimate state interest (minimum scrutiny). *State Util. Comm'n v Carolina Util. Customers Ass'n, Inc.*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994).

Although the plaintiff contends the statute should be subject to strict scrutiny, he alternatively argues that it cannot survive even minimum scrutiny. We agree.

We first determine that the Equal Protection Clause is implicated in this case. The plaintiff suffers from asbestosis, a specifically enumerated occupational disease, N.C.G.S. § 97-53(24)
(1991), and is therefore situated similarly to all other persons with occupational diseases. The question is whether N.C. Gen. Stat. § 97-63, which treats employees with asbestosis and silicosis differently from employees with other occupational diseases, furthers some legitimate state interest.

The defendants argue that the "governmental interests that are served by G.S. § 97-63 include the prevention of forum shopping and the economic interest served by ensuring that North Carolina employers are not burdened with having to pay workers' compensation claims for which they are not responsible." The statute, they contend, "operates to ensure that employees claiming benefits will

have had some rational relationship to the employer ultimately being held responsible for any such claims." Although the prevention of forum shopping and the protection against claims for which the employer is not responsible are legitimate state interests and are served by N.C. Gen. Stat. § 97-63, the statute is grossly underinclusive in that it does not include all who are similarly situated. *See* Lawrence Tribe, *American Constitutional Law* § 16-4 (2d ed. 1988) (underinclusive classification burdens "less than would be logical to achieve the intended governmental end"); *see also Zablockl v. Redhail*, 434 U.S. 374, 390, 54 L.

Ed. 2d 618, 633 (1978) (finding statute underinclusive and therefore unconstitutional); *Bernal v. Fainter*, 467 U.S. 216, 221, 81 L. Ed. 2d 175, 181 (1984) (a classification that is substantially underinclusive undercuts the governmental claim that the classification serves state interests). There are, as noted by the plaintiff, "many other serious diseases, such as byssinosis, that develop over time and to which N.C. Gen. Stat. § 97-63 does not apply" and the defendants have not asserted any justification for treating asbestosis and silicosis differently from these other serious diseases. Accordingly, the constitutionality of N.C. Gen. Stat. § 97-63 cannot be sustained and this case must be remanded to the Commission.

Reversed and remanded.

Judges WYNN and MARTIN, John C., concur.

APPENDIX C

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. 139165

BEAMAN WALTERS, Employee, Plaintiff; -v- ALGERNON BLAIR, INC., Employer; UNITED STATES FIDELITY AND GUARANTY, COMPANY, Carrier, Defendants.	OPINION AND AWARD FOR THE FULL COMMISSION B Y WILLIAM C. BOST DEPUTY COMMISSIONER

FILED: JUNE 28, 1994

This matter was reviewed by the Full Commission on May 18, 1994 upon the appeal of plaintiff-employee from an Opinion and Award of Deputy Commissioner Lawrence B. Shuping, Jr., filed on November 3, 1993.

APPEARANCES

Plaintiff:	Robin E. Hudson, Attorney at Law, Raleigh, North Carolina.
Defendants:	Maupin, Taylor, Ellis & Adams, Attorneys at Law, Raleigh, North Carolina; Jack S. Holmes, appearing.

* * * * * * * * * * * * * *

The undersigned have reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Lawrence B. Shuping, Jr. The appealing party has not shown good ground to reconsider the evidence; receive further evidence; rehear the parties or their representatives; or amend the Opinion and Award.
Code: 224

I.C. NO 139165 PAGE 2

* * * * * * * * * * * * *

The Full Commission adopts the findings of fact found by the Deputy Commissioner as follows:

FINDINGS OF FACT

1. Plaintiff is an unemployed 60 year-old Navy veteran who only finished the ninth grade, but in 1962 obtained his GED or so-called high school equivalency certificate at St. Andrews College while doing construction work there for Albemarle Plumbing and Heating. He has been employed as a pipe fitter in the construction trade for more than 30 years from the early 1950's until August of 1985 when he ultimately retired from the employ of Schneider Power Company at its Shippensport, Pennsylvania nuclear power plant and has worked in the same capacity in a number of different states, including Pennsylvania, New York, Virginia, Maryland, Georgia, Tennessee, South Carolina and North Carolina; however, the majority of his work has been in states other than North Carolina where individuals working in the construction trade occupy a greater status resulting in work outside North Carolina being more desirable.

2. During his many years of employment as a pipe fitter in the construction trade plaintiff has been exposed to the inhalation of asbestos dust either indirectly because insulators working in his vicinity were using the same material or directly when he would have to remove asbestos to make a

weld or would use an insulating asbestos blanket during the course of a weld and as a result thereof has developed asbestosis.

3. Plaintiff was last injuriously exposed to the hazards of asbestosis during the 35 day period from November 17, 1980 to December 21, 1980 that he was employed by defendant Algernon Blair at the Champion Paper Mill in Roanoke Rapids, North Carolina. During this same period plaintiff worked seven days a week, 12 to 15 hours a day. Half the time he worked as a pipe welder directly exposed to the hazards of inhalation of asbestos dust when he would be involved in removing old asbestos insulation in the course of pipe welding and the other half as a foreman responsible for the other pipe welders work there indirectly exposing him to the asbestos when the other pipe welders would remove asbestos insulation in his vicinity.

4. Although prior to the 1970's plaintiff did pipe welding work in North Carolina exposing him to asbestos, including, but not limited to, DuPont's Fayetteville and Kinston Plants, St. Andrews College in Laurinburg, Cape Fear Valley Hospital in Fayetteville, Fort Bragg, the Ralston Purina Plant in Raleigh, the B. F. Goodrich Plant in Lumberton, and Texas Gulf among others; the only work he subsequently did in North Carolina prior to being last injuriously exposed to the hazards of asbestosis during the 35 days he worked for defendant-employer from November 17, 1980 to December 21, 1980

was the little more than a year he was working for Albemarle Heating and Plumbing at Fort Bragg building new barracks beginning in the third quarter of 1972 according to the stipulated Social Security Earnings records and ending in the same quarter of the following year; however, twenty (20) percent of that time plaintiff was working outdoors resulting in him not being exposed to asbestos. Thus plaintiff has not been exposed to the hazards of

inhalation of asbestos dust for a period of not less than two years in the State of North Carolina during the ten years prior to his last exposure to the hazards of the same disease while working for defendant employer in December of 1980.

5. To the extent plaintiff's evidence is otherwise it is neither consistent nor credible. According to the credible evidence the only places that plaintiff worked in North Carolina during the ten years prior to his last injurious exposure to the hazards of asbestos dust were the 35 days he worked for defendant-employer in November and December of 1980 and the little more than a year that he worked for Albemarle Plumbing and Heating at Fort Bragg from the third quarter of 1972 until the same quarter in the following year, less the twenty (20) percent of the time when he was not exposed to asbestos while working outside. While in the 1960's plaintiff did work for DuPont at its Kinston and Fayetteville Plants as well as another plant in Florence, South Carolina; he does not

believe he worked for DuPont in the 1970's and the undersigned specifically finds that plaintiff has failed to produce any credible evidence thereof.

* * * * * * * * * * * * * * *

Based upon the findings of fact, the Full Commission concludes as follows:

CONCLUSIONS OF LAW

1. As a result of exposure to asbestos dust during his many years of work in the construction trade as a pipe welder plaintiff has developed asbestosis. G.S. § 97-62.

2. Plaintiff was last injuriously exposed to the hazards of asbestosis during the 35 days that he worked for defendant-

employer during the period from November 17, 1980 to December 21, 1980. G.S. § 97-57.

3. Plaintiff does not have the requisite exposure in North Carolina to file a claim for compensation benefits for his asbestosis under the Workers' Compensation Act because he was exposed to the inhalation of asbestos dust for less than two years in North Carolina during the ten years prior to his last exposure in the same state while working for defendant-employer in December of 1980.

* * * * * * * * * * * * * * *

Based on the foregoing findings of fact and conclusions of law, the Full Commission affirms the holding of the Deputy Commissioner and enters the following:

I.C. NO. 139165 PAGE 6

AWARD

1. For the reasons described in the above Findings of Fact and Conclusions of Law the Industrial Commission does not have jurisdiction of the involved asbestosis claim and as a result the same must be and is hereby DENIED.

2. Each side shall bear its own costs.

/s/
WILLIAM C. BOST
DEPUTY COMMISSIONER

CONFIRMING:

/s/
JAMES J. BOOKER
COMMISSIONER

/s/
W. JOEY BARNES
DEPUTY COMMISSIONER

APPENDIX D

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. NO. 139165

BEAMAN WALTERS, Employee, Plaintiff;	
-v-	OPINION AND AWARD
ALGERNON BLAIR, INC., Employer;	B Y
UNITED STATES FIDELITY AND GUARANTY COMPANY, Carrier, Defendants.	LAWRENCE B. SHUPING, JR. DEPUTY COMMISSIONER

FILED: N0V 3 1993

This matter, which involves an occupational disease claim for asbestosis, was heard in part by the undersigned on May 17, 1993 in Raleigh. Prior to hearing the parties entered into a Pre-trial Agreement, which is hereby incorporated by reference as if fully set out herein and where they agreed to a number of jurisdictional and other factual stipulations. By subsequent Order thereof the parties were allowed a reasonable period of time to obtain, either by deposition at defendants expense or stipulated report, the medical evidence necessary to complete the record as well as the deposition testimony of an additional lay witness, Keith Hayes, and have since not only deposed the same witness and agreed to stipulate the medical records attached to defense counsel's July 22, 1993 correspondence, including those of Drs. Harris,

Kunstling and Credle, but submitted Statements of Contention; therefore, the same stands ready for appropriate final disposition. Code: 124

APPEARANCES

Plaintiff:	Robin E. Hudson, Attorney at Law, Raleigh, North Carolina.
Defendants:	Maupin, Taylor, Ellis & Adams, Attorneys at Law, Raleigh, North Carolina; Jack S. Holmes, appearing.

* * * * * * * * * * * * *

Based upon the competent evidence adduced at the hearing, the undersigned makes the following additional

FINDINGS OF FACT

1. Plaintiff is an unemployed 60 year-old Navy veteran who only finished the ninth grade, but in 1962 obtained his GED or so-called high school equivalency certificate at St. Andrews College while doing construction work there for Albemarle Plumbing and Heating. He has been employed as a pipe fitter in the construction trade for more than 30 years from the early 1950's until August of 1985 when he ultimately retired from the employ of Schneider Power Company at its Shippensport, Pennsylvania nuclear power plant and has worked in the same capacity in a number of different states, including Pennsylvania, New York, Virginia, Maryland, Georgia, Tennessee, South Carolina and North Carolina; however, the majority of his work has been in states other than North Carolina where individuals working in the construction trade occupy a greater status resulting in work outside North Carolina being more desirable.

2. During his many years of employment as a pipe fitter in the construction trade plaintiff has been exposed to the inhalation of asbestos dust either indirectly because insulators working in his vicinity were using the same material or directly when he would have to remove asbestos to make a weld or would use an insulating asbestos blanket during the course of a weld and as a result thereof has developed asbestosis.

3. Plaintiff was last injuriously exposed to the hazards of asbestosis during the 35 day period from November 17, 1980 to December 21, 1980 that he was employed by defendant Algernon Blair at the Champion Paper Mill in Roanoke Rapids, North Carolina. During this same period plaintiff worked seven days a week, 12 to 15 hours a day. Half the time he worked as a pipe welder directly exposed to the hazards of inhalation of asbestos dust when he would be involved in removing old asbestos insulation in the course of pipe welding and the other half as a foreman responsible for the other pipe welders work there indirectly exposing him to the asbestos when the other pipe welders would remove asbestos insulation in his vicinity.

4. Although prior to the 1970's plaintiff did pipe welding work in North Carolina exposing him to asbestos, including, but not limited to, at DuPont's Fayetteville and Kinston Plants, St. Andrews College in Laurinburg, Cape Fear

Valley Hospital in Fayetteville, Fort Bragg, the Ralston Purina Plant in Raleigh, the B. F. Goodrich Plant in Lumberton, and Texas Gulf among others; the only work he subsequently did in North Carolina prior to being last injuriously exposed to the hazards of asbestosis during the 35 days he worked for defendant-employer from November 17, 1980 to December 21, 1980 was the little more than a year he was working for Albemarle Heating and Plumbing at Fort Bragg building new

barracks beginning in the third quarter of 1972 according to the stipulated Social Security Earnings records and ending in the same quarter of the following year; however, twenty (20) percent of that time plaintiff was working outdoors resulting in him not being exposed to asbestos. Thus plaintiff has not been exposed to the hazards of inhalation of asbestos dust for a period of not less than two years in the State of North Carolina during the ten years prior to his last exposure to the hazards of the same disease while working for defendant-employer in December of 1980.

5. To the extent plaintiff's evidence is otherwise it is neither consistent nor credible. According to the credible evidence the only places that plaintiff worked in North Carolina during the ten years prior to his last injurious exposure to the hazards of asbestos dust were the 35 days he worked for defendant-employer in November and December of 1980 and the little more than a year that he worked for Albemarle

Plumbing and Heating at Fort Bragg from the third quarter of 1972 until the same quarter in the following year, less the twenty (20) percent of the time when he was not exposed to asbestos while working outside. While in the 1960's plaintiff did work for DuPont at its Kinston and Fayetteville Plants as well as another plant in Florence, South Carolina; he does not believe he worked for DuPont in the 1970's and the undersigned specifically finds that plaintiff has failed to produce any credible evidence thereof.

* * * * * * * * * * * * * * *

The foregoing stipulations and findings of fact engender the following

CONCLUSIONS OF LAW

1. As a result of exposure to asbestos dust during his many years of work in the construction trade as a pipe welder plaintiff has developed asbestosis. G.S. §97-62.

2. Plaintiff was last injuriously exposed to the hazards of asbestosis during the 35 days that he worked for defendant-employer during the period from November 17, 1980 to December 21, 1980. G.S. §97-57.

3. Plaintiff does not have the requisite exposure in North Carolina to file a claim for compensation benefits for his asbestosis under the Workers' Compensation Act because he was exposed to the inhalation of asbestos dust for less than two years in North Caroiina during the ten years prior to his

last exposure in the same state while working for defendant-employer in December of 1980.

* * * * * * * * * * * * * * *

The foregoing stipulations, findings of fact and conclusions of law engender the following

AWARD

1. For the reasons described in the above Findings of Fact and Conclusions of Law the Industrial Commission does not have jurisdiction of the involved asbestosis claim and as a result the same must be and is hereby DENIED.

2. Each side shall bear its own costs.

/s/
LAWRENCE B. SHUPING, JR.
DEPUTY COMMISSIONER

Supreme Court, U.S.
FILED
MAR 26 1997
CLERK

(2)

No. 96-1082

In The

Supreme Court of the United States

October Term, 1996

ALGERNON BLAIR AND UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

v.

BEAMAN WALTERS,

Respondent.

On Petition For A Writ Of Certiorari From The Supreme Court Of North Carolina

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is N.C. Gen. Stat. § 97-63 of the North Carolina Workers Compensation Act, requiring that asbestosis claimants have the additional burden of proving two years of exposure to asbestos in North Carolina within the ten years preceding their last injurious exposure, unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

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STATEMENT OF THE CASE

Respondent, Beaman Walters, filed a workers compensation claim on June 6, 1991, under the North Carolina Workers' Compensation Act, North Carolina Gen. Stat. §§ 97-1 *et seq.* (Michie 1996), based on his development of asbestosis, a statutorily-recognized occupational disease under N.C. Gen. Stat. § 97-53(24). North Carolina law requires that under the state Workers Compensation Act, all occupational disease claimants, including asbestosis victims, must (1) meet jurisdictional requirements in order to file claims within the state, N.C. Gen. Stat. § 97-36; (2) establish that their condition is work-related, *Duncan v. Charlotte*, 324 N.C. 86, 66 S.E.2d 22 (1951); and (3) file claims for benefits only against the employer where the claimant last had injurious exposure to the hazards of the disease for a minimum of thirty days or parts thereof. N.C. Gen. Stat. § 97-57. The statutory provision at issue in this case, N.C. Gen. Stat. § 97-63, adds a specific requirement that compensation not be payable unless the asbestosis or silicosis claimant can also prove a period of in-state exposure within a specific time frame – two years of exposure within North Carolina, within the ten years preceding last injurious exposure.

As required under North Carolina law, N.C. Gen. Stat. § 97-57, Walters filed his claim against Petitioner Algernon Blair as the employer where Walters contended he was last injuriously exposed to the hazards of asbestos for the requisite statutory period. Walters contended that his asbestosis was the result of lifetime occupational asbestos exposure and was therefore caused by his employment. In addition, as required under N.C. Gen. Stat. § 97-63, he contended that he had sustained two

years of asbestos exposure in North Carolina during the ten years preceding his last injurious exposure.

The evidence at his hearing showed that Walters is a lifelong resident of Fairmont, North Carolina, who from 1941 through 1985 was employed as a welder and pipefitter. (T. pp. 3, 32) Beginning in the mid-1950's, Respondent began having workplace exposure to asbestos. Pet. App. at 8a. While his exposure during the 1950's took place at job sites in Tennessee and Virginia, for many years throughout the 1960's and early 1970's Walters had substantial workplace exposure to asbestos in North Carolina. (T. pp. 16-19, 20, 23-25) Walters' last exposure to asbestos occurred in 1980, during his employment with Algernon Blair, in North Carolina. Pet. App. at 9a.

In his brief to the Deputy Commissioner, Walters raised the argument that N.C. Gen. Stat. § 97-63 was unconstitutional under various North Carolina and United States constitutional provisions, including Article I, Section 19 of the North Carolina Constitution, and the Fourteenth Amendment to the United States Constitution. The Deputy Commissioner's Opinion and Award found that Walters had been exposed to asbestos dust during his career as a pipefitter and welder, that he developed asbestosis as a result of his workplace exposure, and that he was last injuriously exposed to the hazards of asbestos during his work for Algernon Blair pursuant to N.C. Gen. Stat. § 97-57. Pet. App. at 10a-11a. However, it further concluded that Walters had less than two years of exposure to asbestos dust in North Carolina during the ten years preceding his last injurious exposure and on that basis held that the Industrial Commission did

not have jurisdiction over the claim, which was therefore denied. Pet. App. at 11a.

Walters appealed to the Full Commission, which affirmed the Deputy Commissioner's decision. Walters then appealed to the North Carolina Court of Appeals, again asserting that Section 97-63 is unconstitutional under Art. I Section 19 of the North Carolina Constitution and the Equal Protection Clause of the United States Constitution.

The Court of Appeals reversed the decision below, holding that Section 97-63 violates both constitutional provisions. The Court set forth its equal protection test as follows:

> If the statute impacts upon a suspect class or a fundamental right, the government must 'demonstrate that the classification is necessary to promote a compelling governmental interest' (strict scrutiny). *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). If the statute does not impact upon a suspect class or a fundamental right, it is only necessary to show that the classification created by the statute bears a rational relationship to or furthers some legitimate state interest (minimum scrutiny). *State Util. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 336 N.C. 657, 691, 446 S.E.2d 332, 346 (1994).

Walters v. Blair, 120 N.C. App. 398, 400, 462 S.E.2d 232, 234 (1995). The Court then analyzed Section 97-63 under the minimum scrutiny standard, stating, "[t]he question is whether N.C. Gen. Stat. § 97-63 . . . furthers some legitimate state interest." *Id.* Turning to the only two interests asserted by the Petitioners, the Court ruled:

> Although the prevention of forum shopping and the protection against claims for which the employer is not responsible are legitimate state interests and are served by N.C. Gen. Stat. § 97-63, the statute is grossly underinclusive in that it does not include all who are similarly situated. *See* Laurence Tribe, *American Constitutional Law* § 16-4 (2d ed. 1988) (underinclusive classification burdens 'less than would be logical to achieve the intended governmental end'); *see also Zablocki v. Redhail*, 434 U.S. 374, 390, 54 L.Ed. 2d 618, 633 (finding statute underinclusive and therefore unconstitutional); *Bernal v. Fainter*, 467 U.S. 216, 221, 81 L.E.2d 175, 181 (1984) (a classification that is substantially underinclusive undercuts the governmental claim that the classification serves state interests).

Id. at 401, 462 S.E.2d at 234. The Court noted that, with respect to the purposes proposed, Petitioners "have not asserted *any* justification for treating asbestosis and silicosis differently" than other serious diseases that develop over time, and found Section 97-63 unconstitutional. *Id.* (emphasis added).

Algernon Blair filed an appeal to the North Carolina Supreme Court, which affirmed the decision of the Court of Appeals *per curiam* without discussion. *Walters v. Blair*, 344 N.C. 628, 476 S.E.2d 105 (1996).

REASONS FOR DENYING THE WRIT

This Court should deny review. As will be shown below, there is no controversy or conflict between the

federal appellate or state courts regarding the constitutionality of this type of provision. No decision of this Court, of any other federal court of appeals, or of any other state court of last resort has ruled upon the constitutionality of a provision similar to the one at issue in this Petition. Further, to the extent that the North Carolina Supreme Court relied on the decision of the Court of Appeals, that Court applied the correct "rational basis" test in a manner entirely consistent with this Court's equal protection precedent. The North Carolina Supreme Court was correct in affirming that Section 97-63 violates the state and federal Equal Protection Clauses.

Moreover, the North Carolina Supreme Court's ruling will affect only the relatively tiny number of asbestosis claimants in North Carolina who did not work primarily in North Carolina during the later years of their employment. Walters has not challenged any other provision of the North Carolina Workers Compensation Act governing procedures or benefits due asbestosis claimants, and contends that Section 97-63 is uniquely arbitrary and unjustified. Petitioners have been able to identify only a handful of other states that have provisions similar to Section 97-63. The consequences of the North Carolina decision therefore will not threaten the states workers compensation systems, even were it to be followed in other states.

I. THERE IS NO CONFLICT BETWEEN FEDERAL APPELLATE COURTS OR STATE COURTS OF LAST RESORT ON THIS ISSUE

No federal appellate court has ever decided the constitutionality of a workers compensation provision similar to Section 97-63. There have likewise been no state court decisions of last resort addressing the constitutionality of similar provisions. Petitioners have only identified five other states with similar provisions requiring a period of in-state exposure within a specific time frame (Pet. at 29 n. 12)[1]; North Carolina is the only state jurisdiction known to have addressed the constitutionality of this kind of provision. Petitioners have not pointed to any other state court decision that would suggest that other state courts would rule on this issue differently.

Because of this lack of conflict, and because determining the constitutionality of Section 97-63 would necessarily draw this Court into substantive interpretation of a complex state statute better performed by the appellate courts of North Carolina, Respondent respectfully submits that there is no need for this Court to intervene in this case.

II. THE NORTH CAROLINA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S EQUAL PROTECTION PRECEDENT

Petitioners argue as grounds for certiorari that the North Carolina Court of Appeals' decision applied an

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[1] *See* discussion, Section IV, *infra*.

erroneous standard of review that conflicts with this Court's equal protection "rational basis" standard. Even assuming that the North Carolina Supreme Court fully embraced the reasoning of the North Carolina Court of Appeals, however, the Court of Appeals clearly distinguished between the strict scrutiny and rational basis tests and applied the correct standard. Petitioners omit the relevant language of the Court of Appeals' decision. Pet. at 4. In fact, the Court's opinion properly described and applied the "rational basis" standard.

The Court stated the rule for "strict scrutiny" as requiring the government to "demonstrate that the classification is *necessary to promote a compelling governmental interest*"; under the "rational basis" test, the classification must "bear[] a *rational relationship to or further[] some legitimate state interest.*" *Walters*, 120 N.C. App. at 400, 462 S.E.2d at 234 (emphasis added). The Court then expressly applied the correct standard to this case: "The question is whether N.C. Gen. Stat. § 97-63, which treats employees with asbestosis and silicosis differently from employees with other occupational diseases, *furthers some legitimate state interest.*" *Id.* (emphasis added). The Court of Appeals recognized that the Petitioners suggested "legitimate state interests" served by Section 97-63, but it found that they "have not asserted *any justification* for treating asbestosis and silicosis differently from these other serious diseases." *Id.* at 401, 462 S.E.2d at 234 (emphasis added). The Court therefore held the provision unconstitutional on the grounds that Section 97-63 distinguishes between occupational disease victims "without any valid reason." *Id.* at 400, 462 S.E.2d 233.

The North Carolina Court of Appeals' holding thus rests upon the finding that there is *no* justification whatsoever for drawing a line between asbestosis and silicosis claimants and other occupational disease claimants for the purposes of Section 97-63. This holding is entirely consistent with this Court's precedent, that a statutory provision will be unconstitutional under the rational basis approach if the classification drawn is entirely arbitrary or based on criteria wholly unrelated to the statutory objective. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Petitioners' argument that the Court of Appeals applied the incorrect standard ignores the Court's language discussed above, and is based solely on the Court's citation to a treatise on constitutional law and two "strict scrutiny" cases. Pet. at 9-10. These brief citations occur after the Court of Appeals' first reference to the concept of "underinclusiveness," 120 N.C. App. at 401, 462 S.E.2d at 234, and appear intended to provide general authority for the scope and use of the term. The first authority cited, Laurence H. Tribe, *American Constitutional Law* § 16-4, discusses underinclusiveness in the context of both "rational basis" and "strict scrutiny." As Petitioners themselves argue, however, the treatise emphasizes that the "rational basis" test has not commonly been used to invalidate statutes as underinclusive. Pet. at 10. The Court of Appeals' citation to this authority thus indicates the Court's awareness of the correct standard and its limits. The Court followed its citation to Professor Tribe's treatise with a "see also" citation to two "strict scrutiny" cases, *Zablocki v. Redhail*, 434 U.S. 374 and *Bernal v. Fainter*, 467 U.S. 216. The Court did not expressly state

that it applied the *Zablocki* or *Bernal* analysis, and a "see also" cite means nothing more than that the authority cited constitutes additional source material supporting a proposition. *The Bluebook: A Uniform System of Citation* R. 1.2(a) (15th ed. 1991). Given the Court's repeated, correct expression of the "rational basis" standard, these three citations taken in context fail to establish that the incorrect standard was applied. Even if these citations raise some ambiguity about the Court's rationale, its ultimate finding – that there is *no* basis for distinguishing between asbestosis and other occupational diseases with respect to the classification in question – would survive the "rational basis" test.

Finally, there is no indication from the Court of Appeals' decision, or the North Carolina Supreme Court's affirmation, that a newer, more liberal equal protection analysis was applied. Petitioners characterize this case as out of line with this Court's review of other "social welfare statutes." Pet. at 10-11. The cases cited all construed provisions of the Social Security Act excluding certain groups from benefits. In all of those cases, this Court upheld legislative line-drawing based upon *valid* generalizations about the groups distinguished. *See Bowen v. Owens*, 476 U.S. 340 (1986) (divorced widows reasonably less likely than non-divorced widows to be financially dependent on spouse); *Califano v. Boles*, 433 U.S. 282 (1979) (woman who never married wage earner far less likely to be dependent on him at death); *Mathews v. DeCastro*, 429 U.S. 181 (1976) (divorced wife less likely to be dependent on ex-husband wage earner than wife); *Califano v. Jobst*, 434 U.S. 47 (1977) (marriage of disabled child to non-eligible spouse valid criteria for terminating

benefits since marriage usually related to change in dependency status). As this Court recognized in *Jobst*, however, "a distinction which irrationally differentiates between identically situated persons" would not present a rational justification for a statutory classification. *Id.* at 53. Here, the Court of Appeals specifically found no difference between asbestosis and other occupational disease claimants with respect to the classification at issue. The Court of Appeals' decision therefore does not conflict with the cases relied upon by Petitioners.

III. THIS CASE WAS PROPERLY DECIDED AND DOES NOT REQUIRE REVIEW BY THIS COURT TO CORRECT ANY ERROR

Petitioners argue that this case should be reviewed because the decision below was incorrect. However, the North Carolina Supreme Court was correct in holding that the particular statutory provision at issue, Section 97-63, is unconstitutional. Section 97-63 is a special, unusually harsh provision in the North Carolina Workers Compensation Act that operates to bar otherwise meritorious claims of certain asbestosis claimants and that makes unreasonable distinctions between asbestosis and other occupational disease victims for no legitimate reason. Even if the decision below was in error, which Respondent does not concede, this Court has not chosen to play the role of correcting each and every possibly erroneous decision by the state courts on state law issues, and certiorari should be denied.

Section 97-63 was inserted into a larger statutory scheme enacted by the North Carolina legislature that

establishes requirements for employer liability and payment of limited benefits for on the job injury and occupational disease. Section 97-63 imposes its requirements only on asbestosis and silicosis claimants. As will be shown below, it mandates that once an asbestosis claimant has established that he has a work-related disease and that he was last injuriously exposed while working for the defendant-employer, his otherwise valid claim still will not be compensable unless he can establish two years of in-state exposure within the ten-year period preceding his last injurious exposure. In this case, Beaman Walters had no difficulty establishing extensive in-state exposure during the 1960's, but because he had little in-state asbestos exposure again until 1980, when he worked for Petitioner Algernon Blair, his meritorious claim was dismissed for lack of jurisdiction. Pet. App. at 15a, 17a. If Mr. Walters had been a byssinosis claimant, or if he had incurred his exposure at Algernon Blair a few years earlier, he would have been awarded benefits for his disease. If he had the same exposure during the same period, but had filed a claim for asbestos-related lung cancer, his claim would not have been denied on this basis.

Petitioners argue that the primary purpose of Section 97-63 is to establish a minimum period of exposure required for asbestosis claimants to prove their employment is the "proximate cause" of their disease, without which North Carolina employers would become "general insurers" for asbestosis victims. According to Petitioners, without Section 97-63 there would be no causation requirement for asbestosis claimants. Pet. at 17-20. Petitioners' contention is simply incorrect. This argument

was raised for the first time before the North Carolina Supreme Court, without success.

North Carolina law is clear that all occupational disease claimants, including for asbestosis and for others expressly listed as "scheduled" occupational diseases, must prove a causal relationship between the disease and their employment in order to obtain benefits. Although the Workers' Compensation Act does not contain language expressly requiring all occupational disease claimants to prove their condition is work-related, the North Carolina Supreme Court has established that proof of causal relationship is nonetheless required. In *Duncan v. Charlotte*, 324 N.C. 86, 66 S.E.2d 22 (1951), the Court held that the 1935 amendment adding coverage for occupational diseases, including asbestosis, "in nowise relaxed the fundamental principal which requires proof of causal relation between injury and employment. And none the less, since adoption of the amendment, may an award be sanctioned *unless it can be shown that the disease was incident to or the result of the particular employment in which the workman was engaged.*" *Id.* at 90, 66 S.E.2d at 25 (emphasis added). *See also Booker v. Medical Center*, 297 N.C. 458, 476, 256 S.E.2d 189, 200 (1979). Neither *Booker* nor *Duncan* relied on Section 97-63 in holding that all occupational disease claimants must establish causation. Indeed, despite the finding that Beaman Walters had not met the requirements of Section 97-63, in this case the Industrial Commission found "as a result of exposure to asbestos dust during his many years of work in the construction trade as a pipe welder [Walters] has developed asbestosis." Pet. App. at 17a. Accordingly, there is no legal foundation for Petitioners' argument that Section 97-63

operates to require proof of causation for asbestosis claims.

In addition, even if Section 97-63 were viewed as a causation provision, its requirements are not rationally related to causation, and in fact are contrary to long-established knowledge about the cause and development of asbestos-related disease. First, the statute requires that exposure take place in North Carolina. The legislature could not rationally have believed that workers could only contract asbestosis in North Carolina; this critical jurisdictional requirement in Section 97-63 is entirely unrelated to causation. Second, Section 97-63 requires that the claimant have *recent* exposure to asbestos in order to prevail – exposure must occur within the ten years prior to last injurious exposure. This requirement, however, is flatly contrary to common medical knowledge about the latency period between exposure and the development of asbestosis, which views that asbestosis does not typically develop until *several decades* after exposure. Even very heavy exposure is known to produce a long latency period rarely shorter than fifteen years. *See* Victor L. Roggli and Philip C. Pratt, *Asbestosis, in Pathology of Asbestos-Associated Diseases* 77 (Victor L. Roggli et al. eds., 1992). *See also Honeycutt v. Carolina Asbestos Co.*, 235 N.C. 471, 70 S.E.2d 426 (1952) (recognizing that both asbestosis and silicosis have latency periods of at least 13 ½ years).

In contrast, Section 97-63 focusses on the employee's most recent employment history, a period that is far less relevant to whether the pulmonary disease is work-related. Under Section 97-63, claimants like Mr. Walters are not compensated even though medical opinion holds

that their disease is work-related. On the other hand, a claimant whose only two years of asbestos exposure occurred immediately before last injurious exposure and diagnosis could establish that his asbestosis was work-related and prevail in his claim, even if he lacked any prior workplace exposure and from a medical point of view did not have work-related asbestosis. Given the medical knowledge of causation, then, it is completely *unreasonable* for a "causation" requirement to mandate exposure for a two-year period at the *end* of a claimant's exposure history rather than at the beginning. Section 97-63 does the opposite of what a true proximate cause requirement would do.

While the goal of compensating only those claimants who can prove that their employment caused their diseases is unquestionably legitimate, the provision here acts to screen in or out valid claims based on fortuitous circumstances unrelated to causation. Viewed as a causation requirement, Section 97-63 is the essence of capricious state action. Access to the court system "cannot be granted to some litigants and capriciously and arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 76, 77 (1972) (holding state double-bond requirement for tenants appealing wrongful entry statute unconstitutional, despite purpose to screen out frivolous claims).

The only other purpose Petitioners offer for Section 97-63 is that it is intended to prevent forum shopping and insure that North Carolina employers "are not burdened with workers compensation claims for which they are not responsible." Pet. at 20. Section 97-63, however, is not rationally related to either end.

Section 97-57 of the Workers Compensation Act establishes a level of minimum injurious exposure with the employer that will be held liable for an asbestosis claim. Section 97-63's requirement that the asbestosis claimant have two years of in-state exposure does not require any additional exposure with the employer that will be held liable under Section 97-57, and thus does not ensure additional contacts with the employer that will "pay the costs" of the asbestosis claim. Pet. at 21.

North Carolina law already contains provisions that operate to limit a claimant's ability to forum shop, and Section 97-63 does not further serve this purpose. The Workers Compensation Act ties jurisdiction in workers compensation claims to whether an accident occurred in North Carolina or whether the parties have sufficient additional contacts with the state to warrant jurisdiction. N.C. Gen. Stat. § 97-36. In addition, for all occupational disease claimants, including asbestosis victims, the last injurious exposure provisions of the Act determine the single employer that can be sued and whether a claimant can pursue his claim in North Carolina. N.C. Gen. Stat. § 97-57. In fact, it appears that the majority of state workers compensation statutes have similar last injurious exposure rules applicable to occupational disease claimants that prevent occupational disease claimants from filing multiple claims against employers in different states. 4 A. Larson and L. Larson, *The Law of Workers Compensation* § 95.24 (1996).

Even if Section 97-63 in some rational way furthers the purpose of preventing forum-shopping and ensuring reasonable contacts with the employer obligated to pay the costs, the North Carolina Court of Appeals correctly

found that Petitioners have offered no rational reason for applying Section 97-63 only to asbestosis and silicosis claimants and not to other occupational disease claimants. Petitioners have identified several differences between asbestosis and byssinosis, none of which they contend to have any relationship to the specific purposes they urge for Section 97-63. Pet. at 24-25. The *only* concrete justification Petitioners propose for why asbestosis and not other occupational disease claimants should be subject to Section 97-63 is the contention that construction workers and miners are the employees most likely to be exposed to asbestos, and are likely to change employers more frequently than byssinosis claimants. Pet. at 25. There was no evidence presented to substantiate this extraordinarily broad generalization. Petitioners instead rely on a single North Carolina byssinosis case, *Peoples v. Cone Mills*, 69 N.C. App. 263, 317 S.E.2d 120 (1984), in which the plaintiff worked for one employer for a lengthy period. The Court in *Peoples* did not discuss the length of employment, those facts were irrelevant to the Court's holding, and *Peoples* is not authority for Petitioners' contention. This single case is woefully inadequate to support Petitioners' theory.[2] Neither the North Carolina

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[2] North Carolina textile mills are certainly not immune to plant closing and layoffs that result in changes of employment by mill workers, and Respondent can easily point to reported cases in which asbestosis or silicosis claimants remained with the employer for extended periods. *See, e.g., Young v. Whitehall*, 229 N.C. 360, 49 S.E.2d 797 (seven years of exposure with last employer); *Hartsell v. Hermoid Co.*, 249 N.C. 527, 107 S.E.2d 115 (1959) (almost 40 years exposure with last employer); *Huskins v. Feldspar Corp.*, 241 N.C. 1281, 84 S.E.2d 645 (1954) (over a decade of exposure with last employer).

Supreme Court nor the Court of Appeals, both of which are familiar with the North Carolina economy, gave Petitioners' argument weight.

In the absence of any justification distinguishing asbestosis claimants from other occupational disease claimants for the purpose put forth by Petitioners, the North Carolina Supreme Court correctly held that Section 97-63 is in violation of the Equal Protection Clause. *Royster*, 253 U.S. at 415.

IV. THE DECISION HOLDING SECTION 97-63 UNCONSTITUTIONAL WILL NOT THREATEN WORKERS COMPENSATION STATUTES IN NORTH CAROLINA OR ELSEWHERE

The decision holding Section 97-63 unconstitutional will affect only North Carolina asbestosis claimants who would otherwise be unable to establish the in-state exposure requirements. Comparing the number of these claimants to all occupational disease claimants, or to all injury-by-accident claimants in North Carolina, the proportion of claims affected will be relatively small. Further, Petitioners only have been able to identify five other states that have provisions similar to Section 97-63.[3] Even if

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[3] Petitioners identify eight states that they contend have similar provisions. Of these, only five actually have provisions similar to N.C. Gen. Stat. § 97-63, with in-state exposure requirements during a limited window of time. *See* Ark. Code Ann. § 11-0-602(b) (Michie 1996); Idaho Code § 72-443 (Michie 1989); Iowa Code Ann. § 85A.13(2) (West 1996); Kan. Stat. Ann. § 44-5A10 (1993); Pa. Stat. Ann. tit. 77, §§ 412, 1401(d) (1992). Of the remaining states referred to by Petitioners, the provision

these other jurisdictions followed the North Carolina holding, this decision would have only a limited impact.

Petitioners nonetheless argue that the ruling in this case threatens the continuing validity of the entire workers compensation scheme in North Carolina and elsewhere, on the grounds that this North Carolina Court of Appeals' rationale would erase as invalid any legislative distinctions between different types of occupational diseases. Pet. at 22-23, 26-27, 28-29. However, as explained in Section II, above, the Court of Appeals did not hold that no legislative classifications between occupational diseases are permissible. The Court's decision was properly limited to the constitutionality of Section 97-63, and review by this Court is not necessary.

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cited in the South Carolina statute only requires a minimum period of exposure for byssinosis and not asbestosis claims, with no requirement that exposure be in-state or within a specific window of time. S.C. Code Ann. § 42-11-60 (Law Co-op 1985). Nevada's and South Dakota's provisions only require a period of in-state exposure, without requiring that the exposure take place within a specific time frame. Nev. Rev. Stat. § 617.460(4) (1996); S.D. Codified Laws Ann. § 62-8-14 (1993).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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